

5/31/75

In the Matter of:)
) CRT 84-1:83-CD
1983 Cable Copyright)
Royalty Distribution)

The NAB's motion for declaratory ruling dated April 24, 1985, seeking to obtain an advance legal ruling that the NAB has exclusive claim to certain royalty payments, is not permitted under the Tribunal's order dated April 3, 1985 specifying in detail the various prehearing statements and filings to be submitted by the parties. The Tribunal's April 3rd order was an outgrowth of discussions of counsel for the parties and a joint presentation in writing, dated March 19, 1985, followed by a hearing conference before the Tribunal, held March 26, 1985. While in the discussions among counsel some thought was given to proposing a prehearing procedure for all parties to raise preliminary legal issues, those discussions did not eventuate into any such proposal to the Tribunal. The NAB was a party to those discussions, and it signed off on the joint written presentation dated March 15, 1985 which did not call for a procedure to raise preliminary legal issues. It is unfair, now, for the NAB to attempt to raise a legal issue obviously perceived to be of benefit to it, when all other parties have refrained from doing so in accord with the joint written presentation and the ensuing Tribunal procedural order.

In adopting the April 3rd order, the Tribunal made no provision on its own motion for prehearing rulings on legal issues. To the contrary, in its specification of the contents of prehearing statements, the Tribunal provided that those statements should be informational only and should not contain "advocacy or explanation". There is a sound reason for this. In administrative proceedings before many other government agencies, there are precisely defined hearing issues which set the metes and bounds of the hearing and then it is appropriate to consider prehearing legal arguments over the scope of those issues or to resolve ambiguities in the text of those issues to provide guidance to the administrative law judge trying the case on behalf of the government agency. Here, there is no delegated authority to any presiding judge. There are no precisely drawn hearing issues to be dealt with by legal arguments over the scope or meaning of those issues. The Tribunal members themselves are trying this case with plenary authority to consider, limit or reject evidence, and to otherwise shape the course of the proceeding as best serving their role of allocating royalty funds under the broad mandate of Section 111 of the Copyright Act, in the full light of the Tribunal's prior decisions and Court review of those decisions.

It is clear from the text of the NAB's motion, the comments filed by other parties and the direct cases that were exchanged among the parties and filed with the Tribunal on May 13, 1985 that consideration of the motion at this time is premature. The

motion as well as the proposed direct testimony of Professor Arthur R. Miller state the NAB's adversarial position on complex copyright legal issues. These arguments, on their face, bring into play factual questions that will not be resolved until the evidentiary proofs have been received. The response of the MPAA and its proposed direct testimony of Henry Geller and Jon A. Baumgarten state the MPAA's adversarial position on complex copyright legal issues and likewise make clear that factual evidence will be required before these matters can be resolved. MPAA requests the Tribunal to defer ruling until after testimony and proofs have been given, as do the music claimants in a brief set of comments. The devotional claimants take this opportunity to repeat an adversarial theme in the direct testimony of their witness, Professor David W. Clark, and they oppose the NAB's motion, as does National Public Radio.

The direct written statement of Mr. Baumgarten submitted by MPAA, at page 7, expresses the view that the classes of copyright owners entitled to royalties under Section 111 (d) (4) do not vary with changes of the rules of the Federal Communications Commission (such as rule changes leading to the syndicated exclusivity surcharge which is the subject of NAB's motion and the so-called 3.75% premium signal surcharge which will also be the subject of evidence in the forthcoming proceeding). We believe that Mr. Baumgarten's view on this point is well taken and that all claimant groups have a stake in the entire 1983 royalty fund, contrary to the efforts of some parties to split the fund by establishing separate funds for the syndicated

exclusivity and 3.75% surcharges on some arithmetic "pay-in, pay-out" basis. This entire subject calls for a full evidentiary record followed by the customary post-hearing briefing before the Tribunal will be in a position to make an informed and reasoned judgment in the matter.

PBS opposes the NAB's motion for reasons stated above: (1) it violates the Tribunal's procedural order of April 3, 1985 and procedural fairness to the other parties, and (2) it requests the Tribunal to give an isolated advance ruling on complex copyright legal issues which involve factual determinations that cannot be made until the hearing record is completed.

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May 31, 1985

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of May, 1985, I served the foregoing Comments of PBS on NAB's Motion for Declaratory Ruling upon counsel of record by causing a copy to be mailed, postage prepaid, to the persons on the attached service list.



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